No. 82-1721

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THE SEATTLE TIMES COMPANY, a Delaware corporation, d/b/a, THE SEATTLE TIMES; WALLA WALLA UNION-BULLETIN, INC.; ERIK LACITIS and JANE DOE LACITIS; JOHN WILSON and REBECCA WILSON; JOHN MCCOY and KAREN MCCOY,

Petitioners,

v.

KEITH MILTON RHINEHART, a single person; the AQUARIAN FOUNDATION, a Washington not-for-profit corporation; KATHI BAILEY, a married person, LILLIAN YOUNG, a married person, TONI STRAUCH, a married person, SYLVIA CORWIN, and ILSE TAYLOR, representing women who were members of the Aquarian Foundation on or after March 17, 1978,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Have the respondents made a particularized showing of the need for a protective order where the uncontested evidence is that past publications by the petitioners have always been followed by threats, assaults, bombings, and injury to respondent Rhinehart and the members of respondent Aquarian Foundation?

2. Should a Rule 26(c) protective order be evaluated under the balancing test previously adopted by this Court to evaluate restrictions on first amendment rights where the state has a legitimate purpose unrelated to the suppression of expression?

3. Should a Rule 26(c) protective order be evaluated under a strict prior restraint analysis?

4. Did the petitioners waive their right to contest the constitutional validity of the protective order by agreeing to the entry of a protective order?

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The respondents respectfully ask that the Court deny the petition for a writ of certiorari filed by the petitioners.

STATEMENT OF THE CASE

Respondents Keith Milton Rhinehart, the Aquarian Foundation, a Washington not-for-profit corporation,

and Kathi Bailey have filed their own petition for writ of certiorari from the decision of the Washington Supreme Court from which petitioners seek review. *Rhinehart, et al.* v. *The Seattle Times, et al.*, No. 82-1758. Respondents refer in this brief to their own petition as the "Aquarian Foundation Petition," and to the petition in this proceeding as the "Seattle Times Petition."

The respondents filed this lawsuit for defamation and invasion of privacy in response to a series of articles published by the Seattle Times in an apparent campaign maliciously to defame and scorn the Aquarian Foundation, Reverend Rhinehart, and other members of the Foundation. The history of this lawsuit is set forth in the Aquarian Foundation Petition and will not be repeated here.

The Seattle Times immediately embarked upon an ambitious program of pretrial discovery, which Reverend Rhinehart and the Aquarian Foundation naturally assumed to have been undertaken for purposes of litigation. For example, the Seattle Times asked Reverend Rhinehart to produce all of the following documents prepared by him within the past ten years: United States income tax returns; financial statements; all documents which evidence gifts and donations from any source within the past ten years; all financial statements prepared for the Aquarian Foundation; all documents which evidence all assets and liabilities possessed by Reverend Rhinehart. (Clerk's Papers 730-35) The Seattle Times also set depositions of every plaintiff. (Clerk's Papers 742-44)

The Seattle Times deposed Reverend Rhinehart on June 10, 1980. The deposition opened with a discussion by counsel of documents to be produced. Reverend Rhinehart objected to the production of income tax re-

turns and asked whether information given in discovery could be published by the defendants: "Does that mean the reporters can publish all that?" (Rhinehart Dep., p. 6) Reverend Rhinehart was reluctant to turn over the documents without a court order. Counsel for petitioner Seattle Times stated:

> MR. SCHWAB: I am willing to agree that we can have protective orders concerning personal financial data which would make it impossible for anyone to publish that.

(Rhinehart Dep., p. 6)

Later in the deposition, the Aquarian Foundation's attorney asked, "All financial information is subject to our agreement [that it is not to be published]?" (Rhinehart Dep., p. 21) The attorney for the Times responded:

> MR. SCHWAB: It is very common in lawsuits, Erik [defendant Erik Lacitis, the reporter who wrote several articles defaming the plaintiffs], to have financial information subject to protective order. It means it can be used only in the case.
>
> We will agree financial information that we obtain through discovery in this case from you or the Foundation is only to be used in this case and at trial. Our clients can see it because they are our clients. You have sued them and they work with us. I am sure we will agree that this is not to be published. We don't want the newspaper then publishing your financial affairs.

As a result of these assurances, the defendants were provided with income tax returns of Reverend Rhinehart and other financial information relating to all of the other plaintiffs. In addition, the plaintiffs produced for the defendants documents which literally filled an entire room.

The Seattle Times next served wide-ranging interrogatories on each of the plaintiffs. The interrogatories included a substantial number of questions relating to the financial circumstances of the parties, the names of donors to the Foundation and to the parties, specific information about each person's donations, and the names or addresses of members of the church over the last ten years.

The Aquarian Foundation and Reverend Rhinehart refused to provide a list of the names and addresses of members and donors on the ground that this information is protected by the first amendment of the United States Constitution and the Constitution of the State of Washington. (Reverend Rhinehart's and the Aquarian Foundation's answers are quoted in the Aquarian Foundation Petition, 4-7, 61a-71a.) When the Seattle Times moved to compel discovery of this information, the Aquarian Foundation and Reverend Rhinehart asked for a protective order. (Clerk's Papers 127-29)

Reverend Rhinehart and the Foundation sought the protective order to preserve the privacy of the members of the Foundation, and because they had learned that the Seattle Times or its counsel had been providing information to third parties for purposes of instituting lawsuits against the Foundation. (Clerk's Papers 127-28) The plaintiffs were further startled to learn that the Seattle Times vehemently resisted any protective order (Clerk's Papers 325-34), despite its own counsel's previous agreement to enter a protective order.

The trial judge initially denied the plaintiffs' request for a protective order. The trial court relied on *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), which required a specific factual showing which went beyond mere conclusory allegations. The trial judge stated:

> The cases cited on this subject appear to come down to the proposition that when a court is confronted with the question of whether or not good cause exists for a protective order the case must be decided on its own facts with careful attention to the actual discovery materials involved, the extent to which good cause exists for a protective order and the scope of such an order, if one is to be entered, in order to prevent actual damage or a real threat of an unfair trial environment if the device of a protective order is not used.
>
> In deciding *Halkin*, the Court brushed aside conclusory allegations as being insufficient to justify imposition of a protective order which would have had the effect of imposing prior restraint on the freedom of speech and of the press guaranteed by the First Amendment.
>
> At this time, the plaintiff's motion for a protective order will be denied. This denial, however, is without prejudice to plaintiff's right to move for a protective order in respect to specifically described discovery materials and a factual showing of good cause for restraining defendants in their use of those materials.

(Letter from Judge Jack P. Scholfield to Counsel, dated February 17, 1981, reproduced in the Aquarian Foundation Petition, 72a, 85a)

The plaintiffs had previously filed the affidavits of Keith Milton Rhinehart and of counsel relating that anonymous persons had threatened Reverend Rhinehart with violence on a number of occasions after the Seattle Times published the defamatory articles, and that the Seattle Police Department had advised Reverend Rhinehart to keep his residence a closely guarded secret. (Supplemental Clerk's Papers 36-39) After Judge Scholfield's opinion, the plaintiffs filed additional affidavits to

prove the need to protect the names and addresses of the members of the Aquarian Foundation. Robert Plante, an employee of the Foundation, was the victim of a series of life-threatening incidents at the Seattle church after defendant Seattle Times and defendant Walla Walla Union-Bulletin published articles about the Foundation. These incidents so terrorized Mr. Plante that he was forced to leave Seattle. (App. A, *infra*, 1a)

Mr. Plante witnessed a series of telephone threats, bomb threats, an assault on an elderly female member, a bombing of the church, and an assault with a shotgun. Mr. Plante explained that, "Every time [defendant] Erik Lacitis would write an article in the Seattle Times in reference to the Aquarian Foundation, more of these threats would begin to filter into the church. . . ." Four other members of the Foundation filed similar affidavits. (Clerk's Papers 118-19, 254-60, Second Supplemental Clerk's Papers 8-29)

The trial court then decided that the plaintiffs had established "reasonable grounds" for the issuance of a protective order. (Seattle Times Petition, App. A at 3a) The trial court entered a protective order which states in the preamble that it is based upon the five affidavits submitted by members of the Foundation. (Seattle Times Petition, App. B at 5a)

The Washington Supreme Court upheld the protective order. (Seattle Times Petition, App. C)

REASONS WHY THE WRIT SHOULD BE DENIED

1. Introduction.

This Court should deny the Seattle Times Petition for Writ of Certiorari because the decision of the Washington Supreme Court is consistent with prior decisions of this Court. Any conflict between the decision of the Washing-

ton court and decisions of federal circuit courts of appeals is insubstantial, because the protective order at issue here would be upheld under the reasoning of any case which has dealt with the relationship between protective orders and the first amendment.

The petitioners build their case for review upon a faulty foundation. The petitioners wrongly assume that the first amendment freedom of the press is preeminent among our liberties and that every other constitutional right must yield to the power of the press.

The petitioners have forgotten that the first freedom guaranteed by the first amendment is the free exercise of religion. The petitioners ask the court to force the Aquarian Foundation to divulge the names of its members and donors, a revelation which compromises and infringes upon the first amendment right of every member freely to associate and worship with the Aquarian Foundation. The petitioners insist simultaneously that the court cannot prevent them from trumpeting to the world any information learned through discovery, sanctimoniously insisting that the first amendment exempts the press from any protective order.

The petitioners have forgotten as well that the first amendment applies to the state of Washington only through the due process clause of the fourteenth amendment. Surely the due process clause guarantees to the Aquarian Foundation and its members an effective judicial forum in which to seek redress for injuries inflicted by reckless and defamatory reporting. The petitioners would destroy any semblance of due process by depriving the courts of the power to control their own procedures and by stripping plaintiffs of their constitutional rights as they cross the courthouse threshold.

This distorted perception of our liberties is insupportable. Important though it may be in our democratic society, freedom of the press is not the queen of the Bill of Rights. Indeed, freedom of the press should be regarded as the handmaiden of our other liberties, a mechanism to prevent the state from trammeling the free exercise of religion, of assembly, or redress of grievances.

When constitutional rights collide, they must be weighed against one another to strike a balance which best accommodates the competing claims of the parties. The Washington Supreme Court recognized this fact, and weighed the interest of the state in providing an effective judicial forum, together with the privacy and religious rights of the respondents, against the alleged right of the petitioners to publish freely any information learned through discovery. The Washington court correctly concluded that ample facts supported the trial court's decision to enter a protective order in this case.

This Court need not review the conclusion of the Washington Supreme Court that the petitioners' first amendment claims must yield to accommodate the conflicting interests presented here. However, if the Court grants review of the Seattle Times petition, the Court should also grant review of the Aquarian Foundation petition. The discovery order from which the Foundation seeks review was premised in part upon the continuing validity of the protective order from which petitioners seek review. The discovery order merits review independent of the protective order, but review of the discovery order is even more crucial if review is granted here.

2. The Protective Order Was Amply Justified Even Under The Strictest Prior Restraint Analysis In Light Of The Specific Factual Showing That Members Of The Aquarian Foundation Have Been Threatened, Assaulted, And Injured Following Previous Defamatory Publications By The Seattle Times. (Reply to Petitioners' Argument I)

This Court need not accept review of the decision of the Washington Supreme Court to uphold the protective order because the protective order would be justified under any standard of review in light of the specific factual showing that publication of the information sought in discovery will endanger members of the Aquarian Foundation and subject them to threats upon their lives. The protective order is also necessary to minimize the infringement upon Aquarian Foundation members' rights to freely exercise their religious beliefs and to maintain their privacy. The decision of the Washington Supreme Court is correct whatever standard this Court might adopt, and review by this Court would serve no purpose.

The petitioners note that this Court in *Nebraska Press Association* v. *Stewart*, 427 U.S. 539, 565 (1976), required a specific factual showing before enjoining publication of pretrial news accounts.[1] (Seattle Times Petition 8-9) Similarly, the District of Columbia Circuit Court of Appeals and the First Circuit each emphasized the requirement of a particularized factual showing to justify the imposition of a protective order. *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981); *In re Halkin*, 598 F.2d 176, 192, 195-96 (D.C. Cir. 1979).

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[1] Petitioners also rely upon this Court's review of a trial court's exercise of its discretion under Federal Rule of Civil Procedure 23(d) in *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89 (1981). *Gulf Oil* is inapposite because this Court specifically reserved the first amendment issue. 452 U.S. at 101 n. 15.

The Washington Supreme Court held that the plaintiffs had produced sufficient evidence that they would be harmed by the dissemination of discovery materials. The Washington court examined the three factors identified by this Court in *Nebraska Press Association:*

> As the Supreme Court directed in *Nebraska Press Ass'n*, we must also examine whether the order here furthers those purposes and interests, whether other measures would be likely to mitigate the effects of the unwanted publicity involved here; and how effectively the protective order would operate to prevent the threatened harm.

(Seattle Times Petition, App. C at 12a) The Washington Supreme Court examined the record and found that the plaintiffs had presented sufficient facts to the trial court to justify entry of the protective order:

> Our understanding of [Washington Civil Rule 26(c), identical in all material respects with Fed. R. Civ. P. 26(c)], contrary to that of the federal circuit courts in *In re Halkin*, *supra*, and *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), is that "good cause" is established if the moving party shows that any of the harms spoken of in the rule is threatened and can be avoided without impeding the discovery process. In determining whether a protective order is needed and appropriate, the court properly weighs the respective interests of the parties. . . .
>
> Here, there is no question but that the defendants were threatening to publicize the information which they gained through the discovery process. They insist upon their right to do so. The information to be discovered concerned the financial affairs of the plaintiff Rhinehart and his organization, in which he and his associates had

> a recognizable privacy interest; and the giving of publicity to these matters would allegedly and understandably result in annoyance, embarrassment and even oppression.
>
> . . . .
>
> We find no abuse of discretion and affirm the issuance of the protective order.

(Seattle Times Petition, App. C at 37a-38a)

The Washington Supreme Court properly considered the trial court's initial refusal to enter a protective order based on "conclusory allegations" and the trial court's insistence upon a showing of specific facts to justify the protective order. (Aquarian Foundation Petition, App. G at 85a) The trial court entered the protective order only after five members of the Foundation filed affidavits detailing the numerous assaults and life-threatening incidents which have occurred at the Aquarian Foundation since the publication by the Seattle Times of the defamatory articles. The trial court considered the fact that no such incidents occurred prior to the publication of the articles (Clerk's Papers 257) and that these incidents increased on each occasion the Times published an article (App. A at 4a)

The plaintiffs' specific factual showing of need for a protective order amply justifies the entry of the order even under the most restrictive test suggested by the petitioners, i.e., the prior restraint analysis adopted by this Court in *Nebraska Press Association*.

The petitioners argue that the decision of the Washington Supreme Court conflicts with this Court's decision in *Nebraska Press Association* in "sanctioning a ban on publication without any showing of specific harm caused by such publication." (Seattle Times Petition at 7) The *perceived "conflict" is nonexistent. The record in this*

case is replete with evidence that the members of the Aquarian Foundation would be endangered by public dissemination of their names and addresses, and the Washington Supreme Court correctly relied on this evidence when it affirmed the protective order. The Molotov cocktail hurled through the window of the Aquarian Foundation was not "conjectural," as the petitioners' suggest. (Seattle Times Petition at 7) The blood shed by an elderly female member of the Foundation when two men beat her over the head with a shovel at the entrance of the church does not constitute "speculation." (*Id.*) The death threats, hate mail, and gun-waving incidents are not "factors unknown and unknowable." (*Id.* at 8)

The petitioners misapprehend the reasoning of the Washington Supreme Court and distort the court's decision by lifting quotations out of context. The Washington Supreme Court pointed out that the burden of justifying any protective order is upon the judiciary, and devoted most of its opinion to the role of discovery within the litigation process. (Seattle Times Petition, App. C at 12a-34a) The court concluded that state's interest in the integrity of the adversary system of justice justified the imposition of a protective order upon a proper showing. (*Id.* at 34a-35a) The court then weighed the petitioners' interest in publicizing the information sought through discovery (*Id.* at 36a) against the plaintiffs' rights in maintaining confidentiality of the information and concluded that the protective order was justified under the facts of this case. (*Id.* at 37a-38a)

The petitioners seize upon isolated statements in that portion of the court's opinion dealing with the general interest of the judiciary in maintaining the integrity of the discovery process. The petitioners would have this court believe that these out-of-context statements mean that

the protective order "curtails petitioners' exercise of first amendment rights without any showing of specific harm caused by the publication in question." (*Id.* at 7) The petitioners ignore the Washington court's holding that the trial judge must weigh the respective interests of the parties in light of the facts of the case. (*Id.* at 37a) The petitioners also ignore the trial judge's initial refusal to enter a protective order, a reluctance overcome only by affidavits which specifically listed the danger of disclosure.

The Washington Supreme Court's approval of the protective order was premised upon a specific factual showing that the plaintiffs would be injured by disclosure. There is no conflict between the decision of the Washington Supreme Court, this Court's decision in *Nebraska Press Association*, or the rulings of United States courts of appeals that publication may be restrained only upon a specific factual showing.

3. The Washington Supreme Court Properly Balanced The Plaintiffs' Rights To Freedom Of Religion And Privacy And The State's Interest In The Integrity Of The Judicial Process Against The Petitioners' Rights To Freedom Of Speech And Of The Press. (First Reply To Petitioners' Argument II)

This Court has repeatedly used a balancing test to evaluate restrictions on speech or publication where the state has imposed the restriction for a legitimate purpose unrelated to the suppression of speech. In such cases, this Court has balanced the state's interest in the restriction against the interest of the parties in dissemination or publication of the information in question. *See, e.g., Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969); *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968).

The Washington Supreme Court adopted a similar balancing test in this case. Having found a legitimate state interest in preserving the integrity of the courts through judicial control of pretrial discovery, the court weighed the plaintiffs' interest in privacy and freedom of religion against the petitioners' interest in publication of any information learned through discovery. The decision below is fully consistent with this Court's prior decisions, and, contrary to petitioners' claims, is similar to the approach adopted by federal circuit courts of appeals which have considered similar protective orders.

In *Pickering* v. *Board of Educ.*, a school teacher was fired for writing a letter critical of the school board to a local newspaper. This Court balanced the teacher's first amendment right to comment on matters of public interest against the state's interest as an employer in promoting the efficiency of the public services of its employees. 391 U.S. at 568. The Court employed a similar balancing test in *Procunier* and in *Tinker*. Most recently, the Court followed the *Pickering* balancing approach in *Connick* v. *Myers*, ___ U.S. ___, 75 L. Ed. 2d 708, 722 (1983).

Commentators have suggested that the *Pickering* balancing approach is the appropriate test for evaluating the propriety of a protective order against dissemination or publication of pretrial discovery materials. Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 Colum. L. Rev. 1645, 1654 (1980); Note, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 Duke L. Rev. 766, 794-95.

The First Circuit employed a balancing test in *San Juan Star*, a case on which the petitioners rely heavily. *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 529

F. Supp. 866, 911-12 (E.D. Pa. 1981). The First Circuit decided that the trial court must weigh a number of factors in deciding whether to impose a protective order. *San Juan Star*, 662 F.2d at 116.

The Washington Supreme Court engaged in the same balancing process used by this Court in *Pickering*, *Tinker*, and *Procunier*. The court first pointed out that, "The restraint is not inspired by any governmental objection to the content of the publication. . . ." (Seattle Times Petition, App. C at 11a) (*Compare Procunier:* "[T]he regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." 416 U.S. at 413.) The court discussed at length the goal of pretrial discovery "to enable the parties to prepare their cases for trial." (Seattle Times Petition, App. C at 13a) The Washington court concluded that the judicial system has a legitimate and important interest in protecting the privacy rights of litigants forced to disclose confidential information. (*Id.* at 35a) Having already concluded that no less onerous restrictions would be effective (*Id.* at 12a), the court proceeded to balance the interests of the parties and concluded that the protective order was appropriate. (*Id.* at 37a-38a)

The decision below applies the balancing process adopted by this Court in prior first amendment cases and does not conflict with prior law.

4. The Washington Supreme Court Did Not Hold That The First Amendment Does Not Apply To Pretrial Discovery Materials. (Second Reply to Petitioners' Argument II)

The petitioners argue that the decision below conflicts with decisions of federal circuit courts of appeals insofar as the Washington Supreme Court exempted pretrial discovery from first amendment analysis. The petitioners

have made this argument only by creatively editing to suggest a holding which the Washington court never reached. The "conflict" with federal cases does not exist.

The Washington Supreme Court did not hold that the first amendment has no application to pretrial discovery materials. To the contrary, the court assumed the application of the first amendment and applied a prior restraint analysis to the protective order. (Seattle Times Petition, App. C at 11a) The court discussed the many statutory provisions restricting dissemination of information, and acknowledged that these statutory provisions, like protective orders, encroach upon first amendment rights. (*Id.* at 19a) The court held that the degree of protection afforded by the first amendment increases in proportion to the intensity of the legitimate interest which the public has in learning about the information. (*Id.* at 31a) The court alluded to this Court's prior decisions "balancing First Amendment rights against other interests of the state." (*Id.* at 36a) Finally, the court concluded that the interest of the judiciary in the integrity of its discovery processes is sufficient to meet the "heavy burden" of justifying a protective order. (*Id.* at 37a)

It is surprising that the petitioners argue that the Washington Supreme Court rejected any first amendment protection for pretrial discovery information in the face of the Washington court's prior restraint analysis and constant reference to first amendment rights. The petitioners' interpretation of the decision below is reached by careful selection from the decision of isolated phrases which the petitioners link together through editorial comment:

> The court concludes that "the reporting of supposed facts elicited in discovery" is not pro-

> tected by the First Amendment where such reportage is not characterized by "advocacy or abstract discussion" and involves no apparent "significance with respect to governmental activity." (App. 29a, 36a)

(Seattle Times Petition at 12) These isolated phrases, when restored to their context, simply do not support the petitioners' interpretation.[2]

The decision below is for the most part consistent with the holding in *San Juan Star, supra*. The *San Juan Star* test was devised to protect first amendment rights by weighing the following factors:

> We look to the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary.

662 F.2d at 116. The Washington Supreme Court considered these same factors. (Seattle Times Petition at 12a, 37a-38a) Despite the court's criticism of *San Juan*

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[2] The contexts of the statements are:

> These cases are concerned with the rights of advocacy, and the dissemination of ideas, which lie at the core of First Amendment protection. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978). There is no *advocacy or abstract discussion* involved here—only *the reporting of supposed fact elicited in discovery.*
>
> . . . .
>
> We are not told what interest of the public is served by the newspaper's further exposure of this allegedly religious sect, unorthodox though it undoubtedly is, but we assume that publishers could rightly find it newsworthy. It may have *some significance with respect to governmental activity*, but, if so, that fact has not been brought to light.

(Seattle Times Petition, App. C at 29a, 36a; emphasis supplied.)

Star (Seattle Times Petition, App. C at 27a, 37a), the protective order here would doubtless withstand scrutiny under the *San Juan Star* test, just as the protective order in *San Juan Star* was upheld by the First Circuit.

The petitioners argue that the decision below conflicts with a number of federal cases. These conflicts are either nonexistent or insubstantial. The plaintiffs argue that the decision of the Washington court conflicts with the decision of the District of Columbia Circuit in *In re Halkin*. (Seattle Times Petition at 13-16) The difference between *Halkin* and other federal cases is a matter of degree. *Halkin* is more hostile towards protective orders and more accommodating of first amendment concerns, but both *Halkin* and *San Juan Star* call for consideration of similar factors. *Compare Halkin*, 598 F.2d at 191 *with San Juan Star*, 662 F.2d at 116.

Any difference in result between the two cases may be due in part to the different factual situations in which the issue arose. In *Halkin*, the government had already produced information without the shield of a protective order, and later moved to impose the protective order. 598 F.2d at 180-82. By contrast, in *San Juan Star*, as in this case, private parties sought a protective order before disclosing the information. 662 F.2d at 111. *See also* Note, *The First Amendment Right to Disseminate Discovery Materials*, 92 Harv. L. Rev. 1550 (1979) (criticizing the majority decision in *Halkin* and pointing out that the facts of the case make it unlikely that a protective order would ever be appropriate under any standard).

The petitioners argue that the decision below not only conflicts with *Halkin* and *San Juan Star*, but with a number of other federal cases which have considered the same issue. (Seattle Times Petition at 17) Upon examination, only one of these cases is actually inconsistent with

the decision of the Washington Supreme Court here. *Davis* v. *Romney*, 55 F.R.D. 337 (E.D. Pa. 1972). The other cases cited by the petitioners are either distinguishable on the facts,[3] or fail to support petitioners' own arguments.[4]

The petitioners note correctly that the Second Circuit has stated that there is "no doubt as to the con-

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[3] In *Doe* v. *District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983), the court struck down a protective order which prohibited counsel from discussing with their clients information learned in discovery. The protective order here is far narrower and does not interfere with petitioners' rights to participate in their own defense. In *Koster* v. *Chase Manhattan Bank*, 93 F.R.D. 371 (S.D.N.Y. 1982), the court found it unnecessary to decide among the different standards of Rule 26(c), *San Juan Star* and *Halkin*, because the defendant failed even to meet the lenient good cause standard of Rule 26(c). 93 F.R.D. at 480. In *Krause* v. *Rhodes*, 671 F.2d 212 (6th Cir.), *cert denied*, ___ U.S. ___, 102 S. Ct. 54, 74 L.Ed.2d 59 (1982), the appellate court approved the measures adopted by the trial court "to protect state and federal grand jury secrecy provisions, to protect legitimate law enforcement interests, and to protect the privacy rights of individuals." 671 F.2d at 216. In two of the cases cited by petitioners, the trial court refused to permit publication of information even under the *Halkin* standard. *Tavoulareas* v. *Piro*, 93 F.R.D. 24 (D.D.C. 1981); *Brink* v. *DaLesio*, 82 F.R.D. 664 (D. Md. 1979). *Reliance Ins. Co.* v. *Barron's*, 428 F. Supp. 200 (S.D.N.Y. 1977), and *United States* v. *Exxon Corp.*, 94 F.R.D. 250 (D.D.C. 1981), simply held that a party had failed to prove that it would be harmed by disclosure.

[4] In *Zenith Radio Corp.*, *supra*, the Eastern District Court of Pennsylvania rejected the *Halkin* analysis in favor of the *San Juan Star* standard, which it characterized as a balancing test. 529 F. Supp. at 909, 911-12. Contrary to the petitioners' representations, *United States* v. *Hooker Chemical & Plastics Corp.*, 90 F.R.D. 426-27 (W.D.N.Y. 1981), does not "apply *Halkin*," but deferred the *Halkin* issue until the moving party could present a better record. 90 F.R.D. at 426.

stitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes." *International Products Corp.* v. *Koons*, 325 F.2d 403, 407 (2d Cir. 1963). However, the petitioners fail to cite *In re Upjohn Co. Antibiotic Cleocin Prod.*, 664 F.2d 114, 118, n. 1 (1981), in which the Sixth Circuit questioned the wisdom of the *Halkin* decision and expressly declined to rely on *Halkin*.

The petitioners argue that the decision below "is premised upon an improperly restrictive review of the purposes and uses of civil litigation," quoting federal cases which hold that discovery proceedings are presumptively open to the public. (Seattle Times Petition at 18) Whatever may be the federal rule, the Washington Supreme Court pointed out that Washington pretrial discovery is not open to the public. (Seattle Times Petition, App. C at 25A) This Court need not consider further an issue which is obviously a matter of state law.

The petitioners argue that the decision below "also conflicts with the first amendment test of another state court of last resort," citing two Montana cases. (Seattle Times Petition at 19) Neither Montana case is inconsistent with the decision below. In *Kuiper* v. *District Court*, 632 P.2d 694 (Mont. 1981), the Montana Supreme Court refused to impose a protective order on information independently obtained by the plaintiff through procedures other than discovery proceedings. In *Montana Human Rights Comm'n* v. *City of Billings*, 649 P.2d 1283 (Mont. 1982), the Montana court, like the Washington Supreme Court, found that the privacy rights of the individual litigants outweighed any interest in dissemination of information requested in discovery.

The petitioners fail to note that the decision of the Washington Supreme Court is *consistent* with the deci-

sion of the Court of Appeals of California in *Moskowitz* v. *Superior Court*, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982). The California Court of Appeals rejected *Halkin*, holding that the first amendment does not preclude protective orders forbidding the publication of information obtained through discovery. 187 Cal. Rptr. at 9.

The conflicts which the petitioners perceive between this case and prior federal and state cases are either nonexistent or insubstantial. The Washington Supreme Court has neither approved of a "blanket exception to the First Amendment" nor imposed a gag order, as petitioners claim. (Seattle Times Petition at 16) Review by this Court is not merited.

5. The Prior Restraint Analysis Urged By Petitioners Has No Application To Information Obtained Through Discovery. (Reply to Petitioners' Argument III)

The petitioners argue that the decision below conflicts with prior decisions of this Court by permitting a prior restraint upon a mere showing of good cause. (Seattle Times Petition at 21-25) No such conflict exists because prior restraint analysis does not apply to materials obtained through pretrial discovery.

The two lead cases on which petitioners rely, *Halkin* and *San Juan Star*, both held that prior restraint analysis should not be employed in evaluating the propriety of protective orders imposed during pretrial discovery. *Halkin*, 598 F.2d at 186; *San Juan Star*, 662 F.2d at 115. *See also Koster* v. *Chase Manhattan Bank*, *supra*, 93 F.R.D. at 476.

The historical background of the first amendment makes clear that the First Congress did not intend that the first amendment would restrict the ability of the court to protect the privacy of information discovered through

the court's own process. On September 24, 1789, the Congress passed Section 30 of the Judiciary Act, providing, "*inter alia*, that the deposition after taking 'shall . . . be by him the said magistrate sealed up and directed to such court, and remain under this seal until opened in court.' " *Times News Limited (G. Britain)* v. *McDonnell-Douglas Corp.*, 387 F. Supp. 189, 195 (C.D. Cal. 1974). The first ten Amendments to the Constitution were submitted by Congress to the states by resolution passed either September 25 or September 29, 1789. Thus, the first amendment and the provision for insuring the privacy of material discovered in a deposition were virtually contemporaneous. As stated by Judge Hall in the case cited:

> [I]t is hardly logical that Congress would create the right of privacy in depositions September 24, 1789 (the date of approval of the Judiciary Act by the President) and ask the States to destroy that right the next day or so.

Times News Limited, *supra*, at 195.

The petitioners make the incredible argument that the protective order has curtailed newspaper coverage and has denied to the public factual data to evaluate whether or not the prior defamatory statements were accurate. (Seattle Times Petition at 23) The protective order cannot be read so expansively. The order simply prohibits the defendants from disseminating narrowly defined information "which is gained through discovery." (Seattle Times Petition, App. B at 6a) It may well be that this lawsuit has deterred the Seattle Times from publishing articles about the Aquarian Foundation, but the reason can only be the Seattle Times' belated realization that the

Aquarian Foundation will hold the Times accountable for defamatory journalism.[5]

Finally, the petitioners complain that the duration of the protective order is excessive, illustrating their argument by the fact that the protective order has remained in place since June 26, 1981. (Seattle Times Petition at 24-25) It is difficult to understand why the petitioners complain about the duration of the order. The trial judge stayed the effect of the discovery order pending review of the protective order. (Aquarian Foundation Petition, App. D at 60a) Accordingly, no information has been produced since June 26, 1981, and the only effect of the protective order has been to formalize the Seattle Times' own agreement to the entry of a protective order with respect to financial information already produced.

6. The Defendants Have Waived Any Right To Object To The Protective Order By Agreeing That A Protective Order Should Be Entered.

The petitioners have waived any right to object to the entry of a protective order with respect to financial information disclosed through discovery. Counsel for petitioner Seattle Times agreed during discovery to the entry of a protective order. (*See* page 3, *supra*.) The plaintiffs

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[5] The petitioners argue further that the protective order "halts all such commentary and coverage by The Seattle Times" because, "even if petitioners manage to obtain information about Rhinehart from third parties, they are prohibited from confirming the accuracy of their sources or determining the appropriate leads to follow because such basic journalistic practices would run afoul of the Protective Order. . . ." (Seattle Times Petition at 23, n. 7) The protective order has no such effect. The Seattle Times is free to confirm its sources or follow any leads through information not obtained through discovery. The protective order prevents the petitioners from using information gleaned from the discovery process.

disclosed financial information pursuant to that agreement. The only effect of the protective order is to require the petitioners to live up to the terms of their agreement. The protective order is limited to the financial affairs of the plaintiffs, the names and addresses of the Aquarian Foundation members, contributors or clients, and the names and addresses of those who have been contributors, clients or donors to any of the various plaintiffs. (Seattle Times Petition, App. B at 6a) Since the case can be decided on the grounds of waiver, this Court need not accept review.[6]

Federal courts have consistently held in similar circumstances that a party who agrees to the entry of a protective order may not later contest the order and seek to disseminate information disclosed under the terms of the order. *Martindell* v. *Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 298 (2d Cir. 1979); *Nat'l Polymer Prod. Inc.* v. *Borg-Warner Corp.*, 641 F.2d 418, 423-24 (6th Cir. 1981); *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, *supra*, 529 F. Supp. at 894; *GAF Corp.* v. *Eastman-Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976).

The petitioners have waived any right to contest the protective order entered by the trial court and approved by the Washington Supreme Court. Further review by this Court is inappropriate and unnecessary.

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[6] The Washington Supreme Court declined to hold that all litigants waive their right to contest the constitutionality of protective orders (Seattle Time Petition, App. C at 20a), but never reached the waiver argument suggested here, despite the fact that the plaintiffs argued waiver in the trial court (Clerk's Papers 291-292) and in the Washington Supreme Court. (Brief of Respondents 27-29)

CONCLUSION

The Washington Supreme Court correctly balanced the conflicting constitutional rights involved in this case and properly accommodated those interests consistent with prior decisions of this Court. The "conflict" between the decision of the Washington Supreme Court and prior decisions of this Court is nonexistent or insubstantial. In any event, the petitioners have waived any right to contest the terms of this protective order and review by this Court would be inappropriate.

The Petition for a Writ of Certiorari filed by the Seattle Times and the other defendants should be denied. However, if the Court grants the Seattle Times petition, the Court should also grant the Aquarian Foundation petition.

DATED June 24, 1983

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

No. 80-2-02460-4

KEITH MILTON RHINEHART, a single person, et al.,
Plaintiffs,

v.

THE SEATTLE TIMES, et al.,
Defendants.

SWORN AFFIDAVIT OF ROBERT PLANTE

I, Robert Plante, have been employed by the Aquarian Foundation located at 315-15th Avenue East in Seattle, Washington, for approximately three years. I am head of the Audio-Visual Department of the Aquarian Foundation.

Of the approximately 3 years that I have been employed by the Aquarian Foundation, I have lived in Seattle, Washington, from December 1977 to February 1980. I have been residing in another state after leaving Seattle because of intense fear and anxiety. The following paragraphs describe the reasons for my fears of living and working in the Seattle area for the Aquarian Foundation.

Since the publication of the February 17, 1978, *Walla Walla Union Bulletin* article by John McCoy about the Aquarian Foundation presentation at the Walla Walla State Penitentiary, and the series of articles by Erik Lacitis about the Aquarian Foundation starting in March of 1978 in the *Seattle Times*, many terrifying and threatening incidents have taken place at the Aquarian Foundation.

One incident which happened on September 6, 1978, was a telephone call from an individual known as Laddie Wright at 1:00 a.m. Prior to this date I had received other threatening

phone calls from this individual. The telephone conversation at 1:00 a.m. on September 6, 1978, involved Laddie Wright threatening to kill Reverend Keith Milton Rhinehart and to blow up the church located at 315-15th Avenue East, in Seattle. Since I worked in this building and spent much of my time there, I became fearful for my life at that time.

My fears became even stronger when Laddie Wright entered the church in Seattle on September 6, 1978, at approximately 10:00 p.m. He entered the church where I and others were working. I met with Laddie in the room off to the right of the front hallway as you enter the church. After entering the room, I sat down with him to question him about the threats that he had been calling in to the Aquarian Foundation which referred to killing Reverend Rhinehart and blowing up the church. Suddenly, Laddie opened his shirt to reveal that he was wired with instruments and listening devices. He told me in a note that the wires were transmitting to a van parked outside the church and that people were listening to the conversation we were holding. At a later date, it was learned that Laddie had been armed with a .357 magnum at the time of this incident, and had been sent in so armed by several law enforcement governmental agencies, including the U.S. Customs Agency. This increased my fears even more.

All of these incidents involving Laddie Wright's bomb threats, murder threats, and threatening phone calls were reported to the police department in Seattle. However, despite our reports, no results were obtained. It did not seem that the proper police authorities had any interest in pursuing Laddie Wright.

Another very disturbing incident happened on November 22, 1978. It was at approximately 7:00 p.m. and I had left the church located at 315-15th Avenue East in Seattle for only a short period of time. While I was gone, one of our elderly female members was attacked by two men while she was entering the front door of the church. The two men attacked her by beating her over the head with a shovel until her head

was bleeding and blood was running down her face. It is beyond my understanding why anyone would want to attack an elderly woman, especially on the front steps of a religious organization.

My fears were further strengthened on December 25, 1978 when I received a threatening phone call informing me that our church was going to be blown up. In this particular telephone threat, the caller spoke many obscenities and threatened the lives of many individuals connected with the Aquarian Foundation and especially the life of Rev. Keith Milton Rhinehart. During that same day after it was dark, a bomb did indeed come hurling through a second story window of the Aquarian Foundation located at 315-15th Avenue East in Seattle. When the bomb came through the window, it shattered but did not blow up. The bomb consisted of a wick in a coca-cola bottle with some kind of fluid with white substance-like powder in it. The wick showed signs of having been partially burnt. This took place on Christmas Day. I called the police department to have them come out and investigate this. Before they arrived, another one of our employees picked up the bomb off the floor and set it on a desk without thinking. The reason I mention this is because the other employee's finger prints would have definitely been on the bomb. I will refer to this point as I continue.

When the police responded to my call, the officer who arrived at the church informed me to take the bomb and throw it in the trash. I was extremely fearful and asked him to call the bomb squad in order to dispose of the bomb in the appropriate manner. The officer was hesitant to do this, but he eventually did call the bomb squad.

When the bomb squad arrived, they came to the upstairs floor of the Aquarian Foundation to view the bomb which had a partially burned wick mixed with fluid containing a white powder or substance. After viewing the bomb, they began to laugh. They acted as if it wasn't dangerous even though they hadn't analyzed it. However, when they went to pick up the

bomb, they did it very cautiously with long thong-type holders. I was told by one of the members of the bomb squad that I could get an analysis of the bomb's contents the next day in the downtown office. The next day I went to that office and was informed that the other gentlemen must have been mistaken because the results wouldn't be known for possibly a month. I went back to the bomb squad office several times after that, the last being in July of 1979. I was informed that the bomb contained some kind of flammable fluid. When I questioned them about the white substance in the bottle, they couldn't answer. When I asked if there were any fingerprints on the bottle, they said none showed up even though one of our employees would have definitely had to put his prints on the bomb in order to pick it off the floor of the second story and set it on the desk. I asked for a report on the results of the testing, and six months after the bombing incident, I still hadn't any results from the Seattle Bomb Squad. This added to my suspicions and fears greatly.

My fears grew more by seeing that we were getting little if any results from the police department in Seattle, Seattle being the place that the threats and nerve shattering events were taking place. There were many other threatening phone calls which took place during my employment at the Aquarian Foundation. Everytime Erik Lacitis would write an article in the *Seattle Times* in reference to the Aquarian Foundation, more of these threats would begin to filter in to the church located at 315-15th Avenue East in Seattle Washington.

In December of 1979, my fears were strengthened even more. At this time, I became very, very very afraid of even being in Seattle. The incident that took place at that time was the trip to Bogota, Colombia by members of the Aquarian Foundation, including myself. Reverend Rhinehart had been invited to Bogota to a large parapsychological convention. I went on the trip to film both Reverend Rhinehart and the other participants in this so-called large parapsychological convention. It seems as though we were set up in Bogota, Colombia. During one of Reverend Rhinehart's meetings, which was

sponsored by a group in Bogota, our meeting was infiltrated by DAS agents, that is the Secret Police in Bogota, Colombia. After the meeting, we were arrested and jailed in the most indescribable conditions that one could imagine. Later I found out that while we were jailed on charges of necromancy and witchcraft, Erik Lacitis of the Seattle Times was again feeding false and evil material about the Aquarian Foundation to the media, thus endangering our lives in Bogota and those of our members throughout the world.

After returning to Seattle, Washington and discovering the slanderous filth fed by Erik Lacitis to KOMO-TV and aired to hundreds of thousands of people, my fears heightened to a point that I felt I would have to leave the city and go into hiding in order to get away from the harassment that was taking place in Seattle towards the Aquarian Foundation. But, before I was even able to leave Seattle again, on February 7, 1980, I received a phone call in the morning from an insane person who was echoing the innuendos that Erik Lacitis and John McCoy had set forth in their libelous articles. He was hollering obscenities over the telephone saying he was going to kill all of us homosexuals and all of us sex deviates and especially Rhinehart.

On that afternoon, a crazy man appeared in front of the Foundation located at 315-15th Avenue East in Seattle, out on a public street, on the sidewalk, with a shot gun. He was hollering all kind of obscenities at the church saying he was going to kill that "queer Reverend Rhinehart and all of the queers inside" and so on and so on. At this time he proceeded to take the shot gun out of the case. He broke it down and loaded it, waving it at the church. We had a member, an older woman, who helped us in cleaning and keeping up the church. She was working downstairs and I was afraid for her life since she was near the front door which had a glass window. I had to go downstairs and walk by this glass window to get her upstairs in case this madman tried to break in or shoot through the door. In the building at that time were six other people approximately. As I walked by the window, this crazy man aimed the shot

gun at the glass door. I had to jump back up the stairs in order to avoid being in the line of fire. I did manage to get the lady upstairs and called the police. When the police arrived on the scene, they surrounded this mad man and squatted down behind their cars and told him to drop the shot gun, which he did. They arrested him and took him off—I thought to jail.

When his court case came up, I was called to court to testify. When I arrived at court and his case hearing came before the judge, he was not in court. I found out that he was in a mental hospital and not in jail. It was a further disturbing fact when I found out that he had been released soon thereafter from the mental institution. With the fears growing and mounting with all the disturbance with the slanderous articles coming out in the Seattle Times newspaper, with the non-cooperation of the Seattle police department and also the intrusion and/or infiltration of the Aquarian Foundation by authorized agents of governmental agencies, my fears were so heightened that I decided to leave town and go into hiding. I did this in February of 1980. For five months, I hid out, doing my church duties at a distance, until it reached a point where I had to come back to Seattle for several weeks in order to effect the transfer of my department to another state and to get my duties caught up on the tremendous work load that has accumulated in order for the Aquarian Foundation to counteract the negative articles published by the *Seattle Times* concerning the church and its members and its founder, Reverend Keith Milton Rhinehart.

I have since left Seattle, the town I love, and I do not know when or if I will be able to return.

/s/ Robert Plante

Date: 3/26/81

ROBERT PLANTE